

Office of the
Vice President for Research

DFARS Case 2004-D010

October 12, 2005

THE UNIVERSITY OF
ALABAMA
R E S E A R C H

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
30621 Defense Pentagon
Washington, D.C. 20301-0350

Dear Ms. Williams:

The University of Alabama is submitting comments on your recent proposal to amend the Defense Federal Acquisition Regulations Supplement published in the Federal Register on July 12, 2005 (DFARS Case 2004—D010). The University of Alabama (UA) is concerned that the proposed changes will have substantial impact on UA's performance of fundamental research performed for DOD. The University of Alabama receives substantial funding from federal contracts and as the recipient of such funding has always been a good steward in the management of such funds. We see no need to revise the DFARS in the areas that you are proposing. Specifically, UA is concerned about the following:

1. **There is no demonstrated need for a specific DFARS compliance clause.** Contrary to the unfounded assertions in the IG report, UA and other universities are cognizant of their responsibilities for compliance with the export control regulations. The need for institutional export control compliance programs has been extensively discussed and brought to the attention of academic researchers and administrators in many academic meetings, conferences, workshops and publications in recent years. UA implemented an extensive compliance program in this area and our Associate Vice President for Research has organized and conducted workshops for other universities under the National Council of University Research Administrators. Given the serious concerns with the proposed rule discussed below, the clause as proposed will create confusion and do much more harm than good and is likely to adversely affect U.S. national security. For these reasons, UA urges DOD to withdraw the proposed rule.

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2. **The proposed rule is premature given current consideration of the proper interpretation of the export control regulations.** The Department of Commerce Bureau of Industry and Security (BIS) currently is considering the over 300 comments received in response to its Advanced Notice of Proposed Rulemaking (ANPR; RIN 0694-AD29—Fed. Reg. 3/8/05) concerning the correct interpretation of the deemed exports requirements for equipment use technology in fundamental university research and other contexts. The university and business communities currently are engaged in a dialogue with Commerce about these comments and the BIS response. We also understand that the National Science and Technology Council working group on export controls is discussing these issues within the government. The Commerce Department administers the Export Administration Regulations (EAR) and the State Department administers the International Traffic in Arms Regulations (ITAR). Other federal agencies should await guidance on the correct interpretation of regulatory provisions that are the subject of considerable controversy prior to attempting to impose related contract provisions. Otherwise, there is potential for conflicts between the regulatory provisions or their interpretation and DOD contract requirements.
3. **In proposing this rule, DOD has failed to acknowledge existing national and DOD policies that are directly relevant.** National Security Decision Directive (NSDD) 189, issued by the Reagan Administration in September 1985, established the federal government's policy for controlling information and technology developed through federally-funded research at universities and research institutions. This policy states that the appropriate government mechanism for controlling information generated through federally-funded research (to the extent it is deemed to be sensitive for national security reasons) is the "classification" system. In November 2001, the current Administration reaffirmed that NSDD 189 remains the federal government's policy. By failing to expressly recognize the fundamental research exclusion from export controls in both the EAR and ITAR (which reflects NSDD 189), the proposed rule essentially contravenes government policy. It potentially may subject all DOD-contracted research at universities to requirements for controlling information and technology regardless of whether export control requirements actually apply, which would be directly inconsistent with NSDD 189. In addition, this clause is inconsistent with DOD Instruction 5230.27. Section 4.3 states: *The mechanism for control of information generated by DoD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law.* DOD officials participating in the Workshop on the Department of Defense Notice of Proposed Rulemaking to Amend the DFARS ("NAS Workshop") held

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at the National Academies Keck Center on September 16, 2005 specifically agreed that the proposed rule should acknowledge NSDD 189.

4. **Implementation of the rule as proposed will result in delays and increased costs in performance of DOD research contracts that will be detrimental both to universities and to DOD.** The proposed rule does not explicitly reference applicable exclusions from export controls provided by the EAR and ITAR, such as that for information arising out of or resulting from fundamental research, or the exemptions from licensing requirements. If adopted without including such explicit recognition, the rule may be read to apply export control requirements, as a matter of contract, to information and technology used or generated in the performance of the contract, even when the applicable regulations would not apply controls. Even if this is not the intent, a serious ambiguity would exist under the proposed contract provisions. This inevitably will lead to confusion by contracting officers, protracted contract negotiations related to export controls provisions, delays in research, and an overbroad application of controls contrary to the regulations.
5. **DOD implementation of this requirement as proposed will adversely affect U.S. national security as universities will decline to perform critical research for DOD.** The effect will be to discourage universities from conducting DOD-contracted fundamental research in order to avoid having to preclude the participation of foreign students and researchers in such research. U.S. science and engineering is critically dependent on the participation of foreign nationals. For example, there were over 260,000 foreign students (undergraduate and graduate) in science and engineering fields enrolled in U.S. universities in 2003 (see <http://opendoors.iienetwork.org/?p=49936>). In 2003, foreign nationals earned 38% of the science doctorates and 58.9 % of the engineering doctorates awarded by U.S. institutions. Temporary U.S. residents constituted 59% of U.S. postdoctoral scholars in science and engineering in 2002. Almost half of the U.S. Nobel laureates in science fields since 1990 were foreign researchers. (For this and other data on foreign participation see the recent report of the National Academy of Sciences Committee on Science, Engineering , and Public Policy (COSEPUP), *Policy Implications of International Graduate Students and Postdoctoral Scholars in the United States* (May 2005; available at <http://www.nap.edu/books/0309096138/html/>)).

While the proposed rule characterizes the requirements as clarifications of existing responsibilities, the effect is to create new compliance obligations for DOD contractors. DOD contracting officers are likely to default to use of the proposed new clause in most if not all university research contracts, given the

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statement in the DFARS prescription that contracting officers are to use the clause in solicitations or contracts that *may involve* the use or generation of export-controlled information or technology. They will have little or no incentive not to include the new compliance clause. As noted above, if this clause is included in a contract, the access control requirements may become a matter of contract compliance, regardless of whether the research is fundamental research otherwise excluded from the requirements under the regulations. This will require UA, in order to undertake DOD contracted fundamental research, to badge all foreign nationals and establish segregated facilities to assure that foreign members of the campus community (unless specifically licensed by the government) do not have access to any information or technology controlled under DOD contracts.

As a result, UA may have to decline to perform contracted fundamental research for DOD or will have to undermine the open, collaborative, and international research environment that underlies the productivity and success of the U.S. academic research endeavor and, ultimately, contributes to our nation's security. While other universities have controlled facilities on campus, we do not. UA will experience great difficulty in establishing them both as a matter of policy and because of the substantial costs associated with such facilities. We will have problems agreeing to discriminatory badging requirements for foreign nationals. As a result, we will face the difficult choice of substantially altering the normal open campus research environment to comply with the requirements or "walking away" from the conduct of DOD-contracted research. This will have substantial adverse effects both on us and on the ability of DOD to have cutting edge research performed that is critical to U.S. national security.

6. **The requirements for an "effective export control compliance program" are too broad.** Any contractual compliance requirements should be limited only to the activities applicable to the DOD contract (if not otherwise covered by an exclusion or licensing exemption), and not to any other activities of the contractor. For example, as stated, the proposed rule appears to mandate broad requirements for training employees in export controls and for performance of periodic compliance assessments. While training and assessments undoubtedly are an important aspect of institutional compliance programs, they should not be a matter of contract compliance. Activities beyond those conducted under the DOD contract should not be subjected to prescribed contract requirements in addition to regulatory enforcement. DOD should defer to the appropriate regulatory agencies to establish requirements for institution compliance programs. DOD does not have the authority or responsibility to determine the "effectiveness" of such programs.

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7. **The proposed rule does not require sufficient specificity in the identification of export-controlled information and technology.** DOD should specifically identify by the relevant Export Control Classification Numbers or Munitions List categories the information and technology to be provided for under the contract that DOD believes to be export-controlled. Information and technology arising during or resulting from fundamental research is not controlled if the contractor has not agreed in advance to restrictions on their publication. Sweeping statements such as stating that everything included in or generated under the project is controlled under the EAR or ITAR, even when substantial portions of the project may involve fundamental research or technologies not listed on the EAR or ITAR control lists, are counterproductive. They do not serve to provide a mutual understanding between DOD and the university contractor of the appropriateness of certain regulatory provisions in specific situations nor help to focus attention on the protection of information and technology as intended by the EAR and ITAR. Applying this clause broadly to projects that otherwise would qualify as fundamental research would nullify the exclusion and require institutions to apply for licenses when no license ultimately will be required. The end result is extra work for the universities and the government with no resulting value added for national security.
8. **The proposed rule is overly prescriptive in its requirements for access control plans.** It prescribes very specific processes and mechanisms to control export-controlled information and technology. For example, the proposed clause requires that access control plans include badging requirements and segregated work areas for foreign nationals for access to export-controlled information and technology. This requirement goes beyond the requirements under the National Industrial Security Program Operating Manual for Technology Control Plans for the handling of classified material which provides for "other (security) measures... as appropriate" without necessarily imposing blanket requirements for badging and segregated work areas in all cases. It is not appropriate for controls for unclassified information and technology to be less flexible than for classified information. Control of unclassified export-controlled information should be eligible for at least the same flexibility in application as classified information. DOD officials participating in the NAS Workshop on September 16 supported the removal of the prescriptive requirements in the proposed rule in favor of allowing contractors more flexibility in designing appropriate compliance programs.
9. **The requirement to include the proposed rule in all subcontracts for research will have significant adverse impacts on universities.** As noted above, UA

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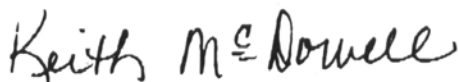
receives contract funding from DOD through subcontracts from defense prime contractors. The proposed rule requires that the clause be "flowed down" from prime contractors to all subcontractors, regardless of whether a particular subcontract may involve a university performing fundamental research related to the work performed under the prime. The proposed clause needs to be modified to carve out exceptions to the flow down requirement when the subcontract involves research subject to the fundamental research exclusion from export controls or other exclusions or license exemptions. The inability to carve out exceptions from other mandatory flow down requirements (i.e. DFARS Clause 252.204—7000 *Disclosure of Information*) has been a continuing problem in the performance of subcontracts under DOD primes.

10. **The proposed rule fails to recognize the extensive government screening process for foreign nationals prior to their admission to U.S. universities for research purposes.** UA has seen no evidence that existing visa and classification processes fail to adequately address concerns about the potential for transfer of any sensitive technologies at universities, nor does the DOD IG Report provide any such evidence. Extensive background checks are conducted on foreign students and scholars entering the U.S. to study and conduct research. The visa screening process has been under ongoing review and improvement to make it more effective and efficient. Once cleared to enter through this process, foreign students and researchers should be permitted to fully participate in the academic research community. We do not understand the need for further restrictions on the individual's ability to participate in the conduct of fundamental, unclassified research, as would result from implementation of badging requirements and segregated work areas for foreign nationals and foreign persons as prescribed in the proposed clause.

Recommendations

In the NAS workshop, DOD officials indicated that DOD has a number of alternatives with regard to its final decision on the proposed rule. **As our preferred option, The University of Alabama believes it would be prudent for DOD to withdraw the proposed rule.** The IG recommendations, at least as they affect universities, do not appear to be based on sound evidence nor are they well-considered. Given the substantial difficulties with the proposed rule, both DOD and the university community would be better served by its withdrawal.

Sincerely,



Keith McDowell
Vice President for Research